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Got Milk... Not Today: The Third Circuit Defends First Amendment Rights for Small Dairy Farmers

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"GOT MILK?" . . . NOT TODAY: THE THIRD CIRCUIT DEFENDS FIRST AMENDMENT RIGHTS FOR SMALL DAIRY FARMERS

> "[T]o compel a man to furnish contributions of money for the propagation of opinions which he disbelieves is sinful and tyrannical . . . ."
>
> —*Thomas Jefferson*[1]

I. INTRODUCTION

Everybody is familiar with the ubiquitous "Got Milk?" advertisements.[2] These ads, which feature a wide range of celebrities, such as Jason Kidd and Britney Spears, wearing white milk moustaches, are part of one of the most widely recognized campaigns in advertising history.[3] What many people do not realize is that compelled assessments, paid by dairy farmers, fund these generic ads.[4] This funding scheme is the result of The Dairy Promotion Stabilization Act of 1983 ("Dairy Act").[5] The federal government has other similar programs—commonly called check-off pro-

1. THOMAS JEFFERSON, VIRGINIA STATUTE FOR RELIGIOUS FREEDOM (1786).

2. For the official "Got Milk?" website, see http://www.got-milk.com (last visited Feb. 24, 2005).

3. For examples of the celebrities featured in the advertising campaign, see http://www.whymilk.com/celebrity_archive.htm (last visited Feb. 24, 2005). *See also* Claudia Kalb, *Got (Enough) Milk?*, NEWSWEEK, Jan. 24, 2005, at 58 (noting popularity of advertising campaign). Although the advertisements are extremely popular, this publicity has not translated into increased milk sales. *See id.* (stating that milk consumption has fallen from high of forty-five gallons per person per year in 1945 to only twenty-two gallons at present time).

4. *See* Inst. for Justice, Cochran v. Veneman*: IJ Challenges Government-Forced Farmer Funding of "Got Milk?" Ads, at* http://www.ij.org/first_amendment/got_milk/index.html (last visited Feb. 24, 2005) (describing source of funds).

5. 7 U.S.C. §§ 4501-4538 (2000). Section 4501 provides, in pertinent part:

> It, therefore, is declared to be the policy of Congress that it is in the public interest to authorize the establishment . . . of an orderly procedure for financing (through assessments on all milk produced in the United States for commercial use and on imported dairy products) and carrying out a coordinated program of promotion designed to strengthen the dairy industry's position in the marketplace and to maintain and expand domestic and foreign markets and uses for fluid milk and dairy products.

Id. § 4501(b).

grams[6]—for agricultural products such as honey,[7] beef[8] and pork,[9] which use compelled assessments to fund generic industry advertisements.

Recently, various circuit courts have ruled on whether compelling producers to fund advertisements to which they object violates the First Amendment.[10] The United States Court of Appeals for the Third Circuit addressed this issue when it considered the validity of the Dairy Act in *Cochran v. Veneman*.[11] The court held that the Dairy Act violated the plaintiffs' First Amendment rights by compelling them to fund speech that they found disagreeable, thus vindicating the free speech rights of small dairy farmers who object to the "Got Milk?" advertisements.[12]

The recent proliferation of appellate litigation over the constitutionality of these check-off programs derives from the Supreme Court's previ-

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6. *See* Bret Fox, Note, *Constitutional Law—First Amendment Review of Beef Check-off Assessments; Beef May Be for Dinner, But May Producers Be Compelled to Say So?*, 4 WYO. L. REV. 397, 397 (2004) ("The term 'checkoff' refers to the fixed, per-unit fee that producers are required by law to pay into the program each time they market a unit of the pertinent commodity."). The fees generated from the check-off programs fund activities such as promotion and research. *See id.* (describing overall uses of typical check-off programs).

7. Honey Research, Promotion, and Consumer Information Act, 7 U.S.C. §§ 4601-4613 (2000).

8. Beef Research and Information Act of 1985 ("Beef Act"), 7 U.S.C. §§ 2901-2911 (2000).

9. Pork Promotion, Research, and Consumer Information Act of 1985 ("Pork Act"), 7 U.S.C. §§ 4801-4819 (2000).

10. *See* Pelts & Skins, LLC v. Landreneau, 365 F.3d 423, 425 (5th Cir. 2004) (holding that requiring alligator hunters and farmers to pay fees to fund generic advertisements violated First Amendment), *vacated and remanded by* Landreneau v. Pelts & Skins, LLC, 125 S. Ct. 2511 (2005) (vacating and remanding decision in light of *Johanns v. Livestock Mktg. Ass'n*, 125 S. Ct. 2055 (2005)); Mich. Pork Producers Ass'n v. Veneman, 348 F.3d 157, 159 (6th Cir. 2003) (affirming district court's decision that compelled assessments under the Pork Act violated First Amendment), *vacated and remanded by* Mich. Pork Producers Ass'n v. Campaign for Family Farms, 125 S. Ct. (2005) (vacating and remanding in light of *Johanns v. Livestock Mktg. Ass'n*); Livestock Mktg. Ass'n v. U.S. Dep't of Agric., 335 F.3d 711, 713 (8th Cir. 2003) (declaring compelled assessments pursuant to Beef Act unconstitutional), *vacated and remanded by* Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055 (2005) (vacating and remanding case in light of Court's ruling that Beef Act is constitutional). For a further discussion of these cases, see *infra* notes 63-72 and accompanying text.

The First Amendment to the Constitution is the citizens' primary protection from governmental infringement on free speech. It states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

11. 359 F.3d 263 (3d Cir. 2004), *vacated and remanded by* Johanns v. Cochran, 125 S. Ct. 2512 (2005) (vacating and remanding decision in light of *Johanns v. Livestock Mktg. Ass'n*).

12. *See id.* at 279-80 (holding that Dairy Act "does not survive the First Amendment challenge lodged by Appellants Joseph and Brenda Cochran"). For a further discussion of the *Cochran* holding, see *infra* notes 110-11 and accompanying text.

ous vacillating approach to similar cases.[13] In 1997, the Supreme Court held that a statute forcing California fruit growers to fund generic industry advertisements did not violate the First Amendment.[14] Four years later, the Court struck down as unconstitutional a statute that obligated mushroom growers to pay for generic advertisements.[15] The Court distinguished the seemingly contradictory holdings by emphasizing the different nature of the two assessment schemes.[16] The central analytical distinction was that the assessment scheme in the valid statute was ancillary to a comprehensive economic regulatory program, whereas the funding scheme in the invalid statute was the main feature of the statute.[17] These rulings left lower courts with the task of deciding whether similar statutes are closer to the former statutory scheme or the latter.[18] This past term, given the lingering confusion, the Supreme Court made what appears to be a final attempt to sort out this area of law: it decided an appeal regard-

13. Before the Third Circuit decided *Cochran*, the Supreme Court had twice decided similar cases, reaching opposite results. *Compare* United States v. United Foods, Inc., 533 U.S. 404, 415-16 (2001) (announcing that Mushroom Promotion, Research, and Consumer Information Act of 1990 was repugnant to First Amendment), *with* Glickman v. Wileman Bros. & Elliot, Inc., 521 U.S. 457, 470-74 (1997) (ruling that compelled assessment to fund generic advertisements pursuant to Agricultural Marketing Agreement Act of 1937 did not violate First Amendment rights of growers, handlers and processors of California fruit trees). For a further discussion on the Supreme Court's holding in *Glickman* and *United Foods*, see *infra* notes 25-62 and accompanying text. *See also* Shannon P. Duffy, *U.S Can't Milk Farmers for Funds for Dairy Campaign: Not Cowed by Precedents, 3rd Circuit Distinguishes a Line of Cases*, LEGAL INTELLIGENCER, Feb. 26, 2004, at 1 (stating that Third Circuit's task in *Cochran* was to determine why Supreme Court ruled one way in *Glickman* and another way in *United Foods*).

14. *See Glickman*, 521 U.S. at 476-77 (upholding statute because First Amendment is not basis for viewing economic regulations, which is area where Court shows Congress "[a]ppropriate respect"). The statute at issue in *Glickman* was the Agricultural Marketing Agreement Act of 1937. 7 U.S.C. §§ 601-626 (2000). For a further discussion of *Glickman*, see *infra* notes 25-48 and accompanying text.

15. *See United Foods*, 533 U.S. at 416 (declaring that assessments pursuant to Mushroom Promotion, Research, and Consumer Information Act of 1990 did not pass constitutional muster). For a further discussion of *United Foods*, see *infra* notes 49-62 and accompanying text.

16. *See United Foods*, 533 U.S. at 412 ("The features of the marketing scheme found important in *Glickman* are not present in the case now before us."). For a further discussion of the Supreme Court's distinguishing rationale, see *infra* notes 58-62 and accompanying text.

17. *See United Foods*, 533 U.S. at 411-12 (recognizing essential difference between regulatory schemes in *Glickman* and *United Foods*).

18. *See* Mich. Pork Producers Ass'n v. Veneman, 348 F.3d 157, 162 (6th Cir. 2003) ("[T]he constitutionality of the Pork Act turns on whether pork is more like mushrooms or more like peaches."), *vacated and remanded by* Mich. Pork Producers Ass'n v. Campaign for Family Farms, 125 S. Ct. (2005); *see also* R.J. Reynolds Tobacco Co. v. Shewry, 384 F.3d 1126, 1134 (9th Cir. 2004) (elucidating distinction between *United Foods* and *Glickman* rationales). For a further list of examples, see *supra* note 10.

ing the constitutionality of the Beef Research and Promotion Act in *Johanns v. Livestock Marketing Ass'n.*[19]

This Casebrief examines the Third Circuit's recent analysis of the constitutionality of compelled assessments for generic advertising in the context of the Dairy Act.[20] Part II summarizes the prior Supreme Court precedent and recent analysis by other circuit courts pertaining to similar statutes.[21] Part III discusses the Third Circuit's approach to such statutes.[22] Finally, Part IV explores the impact that the Third Circuit's analysis will have on the free speech rights of those who are compelled to fund similarly drafted programs.[23] While seemingly large at first, the impact of the Third Circuit's decision has been largely limited in light of the Supreme Court's latest check-off program decision.[24]

II. SUPREME COURT AND CIRCUIT COURT JURISPRUDENCE

A. *Prior Pertinent Supreme Court Precedent*

1. Glickman v. Wileman Bros. & Eliott, Inc.

The Supreme Court's initial encounter with the First Amendment implications of agricultural check-off programs came in the 1997 case of *Glickman v. Wileman Bros. & Eliott, Inc.*[25] The statute at issue in the case

19. 125 S. Ct. 2055 (2005) (resolving question of constitutionality of Beef Act, setting precedent that implicates many similar acts). This was the Court's third time in eight years that it had to decide upon the constitutionality of a check-off program.

20. For further discussion of the Third Circuit's check-off program jurisprudence, see *infra* notes 75-155 and accompanying text.

21. For a discussion of Supreme Court and circuit court decisions, see *infra* notes 25-74 and accompanying text.

22. For a discussion of Third Circuit jurisprudence, see *infra* notes 75-155 and accompanying text.

23. For a discussion of the impact of the Third Circuit's decision and current state of this area of jurisprudence in general, see *infra* notes 156-79 and accompanying text.

24. For a discussion of the limiting effect on free speech resulting from the Supreme Court's very recent check-off opinion, see *infra* notes 156-79 and accompanying text. For an example of some of the early predictions about the impact of the *Cochran* decision that ultimately proved false, see Jim Edwards, *Got Milk? (Got Mess): A Legal Battle over Food Marketing "Checkoffs" Threatens to Eliminate $700 Million in Annual Spending on Everything from Milk and Produce to Cotton. Here's the Story of Madison Avenue's Unlikely Fight with American Farmers,* BRANDWEEK, Apr. 19, 2004, *available at* 2004 WL 63811440 (postulating potential impact of *Cochran*).

25. 521 U.S. 457, 460-61 (1997) ("The question presented to us is whether the requirement that respondents finance such generic advertising is a law 'abridging the freedom of speech' within the meaning of the First Amendment."); *see also* Steve Simpson, *We're Talking Here: Speech Is Speech, Even When It Comes in Commerce—Like the "Got Milk?" Ads Now Before the 3rd Circuit,* LEGAL TIMES, Jan. 12, 2004, at 44 (noting that, before Third Circuit heard *Cochran,* Supreme Court dealt with this issue twice in context of agricultural promotion programs, once in *Glickman* and once in *United Foods*).

was the Agricultural Marketing Agreement Act of 1937 (AMAA).[26] Pursuant to the AMAA, marketing orders may be promulgated; these marketing orders supplant competition in many markets and take the form of economic regulation.[27] The Court noted that "[c]ollective action, rather than the aggregate consequences of independent competitive choices" exemplifies the markets under the AMAA.[28]

In *Glickman*, a large California fruit producer challenged the constitutionality of the AMAA after the producer was required to pay for a generic California fruit advertisement pursuant to the statute.[29] In evaluating the constitutionality of the statute, the Court considered whether the compelled funding was a "First Amendment issue . . . or simply a question of economic policy for Congress and the Executive to resolve."[30] In reaching its decision, the Court noted that it is extremely important to look at the overall statutory context.[31] The *Glickman* Court found that the AMAA contained three characteristics that distinguished it from laws that it previously struck down as violative of the First Amendment.[32] First, the AMAA scheme did not prevent the producers from conveying any message to any audience.[33] The Court noted that this fact distinguished *Glickman* from its line of cases pertaining to "commercial speech."[34]

Commercial speech, as opposed to public discourse, first received formal protection from the Court nearly thirty years ago, and it protects advertisers' ability to freely communicate with their intended audience.[35]

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26. 7 U.S.C. §§ 601-626 (2000). Section 602 states, in pertinent part, that the purpose of the AMAA is "to establish and maintain . . . orderly marketing conditions for agricultural commodities in interstate commerce." *Id.* § 602(1).

27. *See Glickman*, 521 U.S. at 461-62 (describing specific workings of marketing orders and entire AMAA). The AMAA marketing orders remove competition from various markets and may take numerous forms, such as: (1) supplying a uniform price for all producers in a common market; (2) specifying the quantity and grade of the commodity that can be marketed; (3) disposing surplus in an orderly manner; and (4) authorizing joint research and development projects and inspection projects. *Id.* at 461. These marketing orders were "expressly exempted from the antitrust laws." *Id.* (citing 7 U.S.C. § 608b).

28. *Id.*

29. *See id.* at 461-64 (stating facts).

30. *Id.* at 468.

31. *See id.* at 469 ("In answering [this] question we stress the importance of the statutory context in which [the legal question] arises.").

32. *See id.* at 469-70 (listing distinguishing characteristics).

33. *See id.* at 469 (noting producers' ability to communicate any message that they wanted).

34. *See id.* at 469 n.12 (providing list of Court's "commercial speech" precedent); *see, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 571-72 (1979) (deciding that regulation completely banning promotional advertising by electrical utility company violates First Amendment).

35. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 762 (1976) (announcing that speech which does "'no more than propose a commercial transaction'" retains First Amendment protection) (citation omitted). For a discussion of the primary test—the *Central Hudson* test—used to evaluate commercial speech cases, see *infra* note 53 and accompanying text.

The rationale behind protecting commercial speech, such as commercial advertising, was that it disseminates information the public needs to make informed decisions and efficiently allocate resources.[36] Commercial speech, however, does not enjoy full First Amendment protection and may be restricted under certain circumstances, which the Court found inapplicable to *Glickman*.[37]

Second, the Court noted that the AMAA did not compel participation in any "actual or symbolic" speech, and it declared that this distinguished the AMAA marketing orders from the Court's body of law on compelled speech and compelled association.[38] The Court previously emphasized that a First Amendment violation occurs when people are forced to repeat an ideological government message with which they disagree, or are forced to use their private property to communicate a personally disagreeable ideological message.[39] Compelled assessments for generic advertise-

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36. *See id.* at 765 (explaining rationale behind commercial speech). Justice Blackmun stated quite eloquently:

> Advertising . . . is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed. To this end, the free flow of commercial information is indispensable. . . . Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Id.; *see also* Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1, 4 (2000) (distinguishing commercial speech from public discourse). Public discourse is a more highly valued form of speech, because it is viewed as "a valuable way of participating in democratic self-determination." *Id.* Robert Post effectively analyzes the main principles deduced from Justice Blackmun's opinion. *See id.* at 8-15 (summarizing principles derived from *Va. State Bd. of Pharmacy*).

37. For a discussion of the current test used to determine when commercial speech may be restricted, see *supra* note 53 and accompanying text.

38. *See Glickman*, 521 U.S. at 469 n.13 (listing distinguished cases); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (striking down statute that compelled school children to recite pledge of allegiance).

39. *See* Wooley v. Maynard, 430 U.S. 705, 717 (1977) (holding that New Hampshire violated appellees' First Amendment rights by requiring them to display state motto "Live Free or Die" on their license plates). The Court in *Maynard* recognized that a necessary corollary to freedom of speech is the freedom to not speak. *See id.* at 714 ("The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'") (citation omitted). Even if the State's interest is legitimate, the Court noted that the individual's First Amendment rights weigh heavily against that interest. *See id.* at 717 ("[W]here the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message."); *see also* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 559 (1995) (announcing that State cannot force private citizens organizing parade to include group that endorses message that organizers find disagreeable); *Barnette*, 319 U.S. at 642 (1943) (ruling that West Virginia State Board of Education resolution requiring all students and teachers to participate in flag salute and

ments, however, do not require the contributors themselves to speak or display a message—thus, the Court found this line of precedent inapposite to the regulatory scheme in *Glickman*.[40]

Finally, the Court highlighted the fact that the regulatory scheme did not "compel the producers to endorse or to finance any political or ideological views."[41] The Court felt that this fact distinguished this case from a line of cases, including *Keller v. State Bar of California*,[42] in which it recognized First Amendment violations arising from statutes that compel an individual to fund personally disagreeable ideological speech.[43] The Court,

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pledge of allegiance activities "invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control"). *See generally* Edward J. Schoen et al., *United Foods and Wileman Bros.: Protection Against Compelled Commercial Speech—Now You See It, Now You Don't*, 39 AM. BUS. L.J. 467, 470-75 (2002) (providing background summary of *Barnette/Maynard* line of Supreme Court cases).

40. *See Glickman*, 521 U.S. at 470-71 (asserting that Court's "compelled speech case law" is "clearly inapplicable" to case at bar).

41. *Id.* at 469.

42. 496 U.S. 1 (1990). In *Keller*, attorneys challenged the California Bar's policy of using compulsory dues to fund political and ideological activities. *Id.* at 4. The Court found that the use of the mandatory dues in this case violated the attorneys' First Amendment rights. *Id.* at 14. The Court explained that mandatory dues can be used to fund activities necessarily and reasonably related to the purpose of regulating the legal profession, which is improving the quality of the legal field. *Id.* at 14.

43. *See Glickman*, 521 U.S. at 470 n.14 (distinguishing prior precedent). This "compelled speech" line of cases, which recognized the free speech protections against forcing individuals to fund political or ideological speech, began with *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961). In *Street*, the Court held that a union could not finance political campaigns or ideas against the "expressed wishes of a dissenting employee, with his exacted money." *Id.* at 770. On the other hand, the Court held that union dues could be used to fund the collective bargaining process. *See id.* at 768 (noting that while Court does not define precise limits of union's power to spend exacted money, compelling funding of disagreeable political ideas is beyond that limit). The Court distinguished between the use of compelled funds for activities central to the reason why Congress felt unions acceptable in the first place (i.e., expenses for negotiations or administrative costs). *See id.* ("In other words, it is a use which falls clearly outside the reasons advanced by the unions and accepted by Congress why authority to make union-shop agreements was justified.").

The next case in this line of precedent is *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), which was abrogated on other grounds. The issue in *Abood* was whether government employees represented by a union, even though they are not union members, may be forced to pay fees equivalent to union dues as a condition for employment. *See id.* at 211 (presenting issue). This arrangement is called a "union-shop." *See id.* (explaining fee arrangement). The Court upheld this arrangement, citing the importance of the union-shops to Congress's established system of labor relations. *Id.* at 222. The compelled fees were deemed acceptable because they were used for the central purposes that justified forming the group relationship in the first place. *See id.* ("'The furtherance of the common cause leaves some leeway for the leadership of the group. As long as they act to promote the cause which justified bringing the group together, the individual cannot withdraw his financial support merely because he disagrees with the group's strategy.'" (quoting *Street*, 367 U.S. at 778)). Justice Stewart affirmed the principle that mem-

however, opined in *Glickman* that these cases did not provide a blanket rule preventing all compelled financial support for any "organization that conducts expressive activities."[44] Instead, the Court asserted that its prior decisions "provide affirmative support for the proposition that assessments to fund a lawful collective program may sometimes be used to pay for speech over the objection of some members of the group."[45] In accordance with the *Keller* line of cases, the Court asserted that compelled assessments to fund group activities are constitutional, as long as they are used for activities "germane" to the goals of the group that justify the association, and are not used to fund ideological activities outside these central goals.[46]

Examining the facts of *Glickman*, the Court determined that generic advertising was "germane" to the stated reason of the marketing orders, namely, maintaining orderly marketing conditions and fair prices for agricultural products, and that the assessments did not fund activities of an ideological nature.[47] It then concluded that the marketing orders were a type of congressional economic regulation that should enjoy a "strong presumption of validity" and held that the orders were constitutional.[48]

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bers cannot be compelled to contribute towards political candidates or ideas "unrelated to its duties as exclusive bargaining representative." *Id.* at 234. Justice Stewart also noted that unions could still spend money on political ideas, as long as the dues are paid by non-objecting members who are not coerced to pay at the threat of losing their jobs. *See id.* at 235-36 (explaining rationale).

The Court's next compelled speech case, *Keller*, also protected against mandatory contributions for political or ideological speech. *See Keller*, 496 U.S. 1, 14 (1990) (stating holding). The petitioners in *Keller* urged that the State Bar infringed on their First Amendment rights by using membership dues to fund certain political and ideological endeavors. *See id.* at 4 (stating facts). The Court extended its *Abood* analysis to these facts, holding that the State Bar may "fund activities germane to those goals [of compelled association] out of the mandatory dues of all members," including the central reason for having a State Bar—improving the quality of legal services. *See id.* at 13-14 (extending *Abood* analytical approach to *Keller*). The State Bar, however, cannot "in such manner fund activities of an ideological nature which fall outside of those areas of activity." *Id.* at 14. For background on this trilogy of cases, see Schoen et al., *supra* note 39, at 475-79.

44. *Glickman*, 521 U.S. at 471.

45. *See id.* at 472-73 (applying *Keller* test to facts of *Glickman* and asserting assessments in this case were valid).

46. *See id.* at 473 (summarizing central principles derived from *Abood* and *Keller*). So, for example, the State Bar in *Keller* can fund activities out of mandatory dues that further the interest in regulating the legal industry and increasing the quality of legal services, because those goals are germane to the reason a State Bar is justified. *See id.* (delineating activities that State Bar may and may not fund).

47. *See id.* (averring that *Glickman* was "clearly" harmonious with *Keller* test because "(1) the generic advertising of California peaches and nectarines [was] unquestionably germane to the purposes of the marketing orders and, (2) in any event, the assessments [were] not used to fund ideological activities").

48. *Id.* at 477 (finding no sufficient reason for overriding judgment of legislators).

2. United States v. United Foods

Four years later, in *United States v. United Foods*,[49] the Supreme Court held that a similar compelled assessment scheme for generic advertising imposed on mushroom industry members did, in fact, violate the First Amendment.[50] The Court began its analysis by recalling the origin of the "commercial speech" doctrine, and then noted that it had previously used a lesser standard of review for commercial speech than for other speech, such as purely private speech.[51] This lesser standard of scrutiny, derived from the Supreme Court case of *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,[52] has received much criticism since its inception.[53] By holding that the assessments at issue in *United Foods* were unconstitutional even under the lesser standard of scrutiny, the Court sidestepped the issue of whether the *Central Hudson* test was still valid.[54]

49. 533 U.S. 404 (2001).

50. *See id.* at 416 (holding assessments are not permitted under First Amendment). The statute in question was the Mushroom Promotion, Research, and Consumer Information Act of 1990. *See* 7 U.S.C. §§ 6101-6112 (2000). The Act states:

> It is declared to be the policy of Congress that it is in the public interest to authorize the establishment, through the exercise of powers provided in this chapter, of an orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—
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> (1) strengthen the mushroom industry's position in the marketplace;
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> (2) maintain and expand existing markets and uses for mushrooms; and
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> (3) develop new markets and uses for mushrooms.

Id. § 6101(b).

51. *See United Foods*, 533 U.S. at 409 (denoting origin and rationale of commercial speech and lesser standard of scrutiny that has historically been applied to commercial speech). The Court defined commercial speech as "speech that does no more than propose a commercial transaction." *Id.*

52. 447 U.S. 557 (1980).

53. *See United Foods*, 533 U.S. at 409 (detailing instances of criticism of *Central Hudson* test); *see also Glickman*, 521 U.S. at 504 (Thomas, J., dissenting) (rejecting *Central Hudson* test and corresponding notion that commercial speech should generally be given less weight); Post, *supra* note 36, at 34-57 (analyzing and criticizing *Central Hudson* test). Robert Post blames the *Central Hudson* test for "prematurely stunt[ing] the evolution of the doctrine" of commercial speech. *Id.* at 55. The test, as phrased by the Supreme Court in *Central Hudson*, is as follows:

> In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

Cent. Hudson, 447 U.S. at 566.

54. *See United Foods*, 533 U.S. at 410 (Stevens, J., concurring) ("We need not enter into the controversy, for even viewing commercial speech as entitled to lesser protection, we find no basis under either *Glickman* or our other precedents to sustain the compelled assessments sought in this case."). Additionally, the govern-

The *United Foods* Court next considered its precedent concerning compelled subsidies for speech and determined that the case did implicate the First Amendment because the mushroom producers disagreed with the subsidized advertisements.[55] The advertisements conveyed the message that all mushrooms are the same, and the complaining producers wanted their mushrooms viewed as superior.[56] Although this disagreement may seem minor, it does not negate the risk to First Amendment rights affected by such government compelled subsidies.[57]

The Court established that *Glickman* was not controlling because, even though the respective statutes contained similarities, there was one fundamental difference[58]—the assessments in *Glickman* were "ancillary" to the comprehensive marketing program while the advertising under the mushroom scheme was "far from being ancillary," instead it was the main object of the regulation.[59] Once again, the Court invoked the central holding of its *Keller* decision, which compels objecting group members to subsidize speech that is "germane to the larger regulatory purpose which

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ment did not rely on the *Central Hudson* test in its appeal. *See id.* (indicating that Court did not have to address *Central Hudson* question because government failed to rely on it in its brief).

55. *See id.* at 410-11 (reciting starting point for analysis).

56. *See id.* at 411 (referring to respondent's main disagreement with generic industry advertising scheme).

57. *See id.* (recognizing fact that First Amendment scrutiny must still be passed despite fact that disagreement with speech produced by compelled contributions may seem minor). The Court stated:

> First Amendment values are at serious risk if the government can compel a particular citizen, or a discrete group of citizens, to pay special subsidies for speech on the side that it favors; and there is no apparent principle which distinguishes out of hand minor debates about whether a branded mushroom is better than just any mushroom. As a consequence, the compelled funding for the advertising must pass First Amendment scrutiny.

Id.

58. *See id.* (indicating that *Glickman* is not controlling to outcome of case at bar).

59. *See id.* at 411-12 (distinguishing statutory scheme found in *Glickman* with Mushroom Act). Once again, the Court emphasized the importance of taking the whole statutory context into account for analytical purposes. *See id.* at 412 (citing Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 455, 469 (1997)) (noting importance of looking at "entire regulatory program"). The Court noted some of the critical factors of the statutory context in *Glickman*, including that the marketing orders "'displaced competition'" and that the fruit producers were bound together in collective action. *See id.* (recounting key statutory factors that led Court to decide *Glickman* in manner it did) (citation omitted). This led the Court to believe that mandatory contributions to the advertising scheme in *Glickman* were a "logical concomitant of a valid scheme of economic regulation." *Id.* The features that the Court found important in *Glickman* were not found in the Mushroom Act scheme, namely because the mandatory assessments in the case at bar were used exclusively for the purposes of generic advertising. *See id.* (stating differences between respective schemes). The mushroom growers were "not forced to associate as a group which makes cooperative decisions." *Id.*

justified the required association."[60] After noting that it never upheld compelled funding for speech where the speech itself is the primary object of the program, the Court stated that holding "speech is germane to itself" would empty the *Keller* line of cases of meaning.[61] The factual distinction between *Glickman* and *United Foods* left much room for the lower courts to interpret other similar check-off programs.[62]

B. *Recent Analysis by Other Circuit Courts*

Multiple circuit courts have reviewed the constitutionality of similar check-off programs.[63] For instance, the Sixth Circuit recently decided that the Pork Promotion, Research, and Consumer Information Act[64] ("Pork Act") was unconstitutional.[65] The court determined that the Pork Act was "nearly identical" to the Mushroom Act at issue in *United Foods* and, accordingly, found that precedent controlling.[66] In effect, the Pork Act's only purpose was to promote the pork industry.[67] The Sixth Circuit also refused to apply the lesser standard of scrutiny for commercial speech found in the *Central Hudson* test.[68]

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60. *See id.* at 414 (applying central holding of *Keller* to facts of *United Foods*). The Court stated that its *Abood/Keller* line of cases stands for a broader principle than what may have been extracted from its opinion in *Glickman*. *See id.* at 413 (indicating broader reading of *Abood*). The Court stated:

> We did say in *Glickman* that *Abood* "recognized a First Amendment interest in not being compelled to contribute to an organization whose expressive activities conflict with one's 'freedom of belief.'" . . . We take further instruction, however, from *Abood*'s statement that speech need not be characterized as political before it receives First Amendment Protection.

Id.

The Fifth Circuit has recently explained the overarching principle to take from *United Foods* quite lucidly. *See* Pelts & Skins, LLC v. Landreneau, 365 F.3d 423, 433 (5th Cir. 2004) ("When the government binds individuals into a collective association, the government can also require that those persons subsidize speech germane to the purpose underlying the association."), *vacated and remanded by* Landreneau v. Pelts & Skins, LLC, 125 S. Ct. 2511 (2005) (vacating and remanding on other grounds).

61. *See United Foods*, 533 U.S. at 415 (indicating that to hold speech that is germane to itself would deplete *Abood* and *Keller* of any significance).

62. For a discussion of recent circuit court decisions concerning the constitutionality of check-off programs, see *infra* notes 63-72 and accompanying text.

63. For a list of recent appellate cases, see *supra* note 10 and accompanying text.

64. 7 U.S.C. §§ 4801-4819 (2000).

65. *See* Mich. Pork Producers Ass'n v. Veneman, 348 F.3d 157, 159 (6th Cir. 2003) (affirming district court's ruling that Pork Act violated First Amendment protections), *vacated and remanded by* Mich. Pork Producers Ass'n v. Campaign for Family Farms, 125 S. Ct. (2005).

66. *See id.* at 162-63 (noting statutory similarities between Pork Act and Mushroom Act, which Supreme Court held unconstitutional in *United Foods*).

67. *See id.* at 163 (stating that promotion was sole purpose of Pork Act).

68. *See id.* (asserting that *Central Hudson* test was inapplicable). The Sixth Circuit highlighted the difference between this type of case and the typical commer-

Similarly, in reviewing the constitutionality of the Beef Promotion and Research Act of 1985[69] ("Beef Act"), the Eighth Circuit held that the Beef Act was materially the same as the Mushroom Act at issue in *United Foods*, and that the commercial speech was the principal object of the statute.[70] Unlike the Sixth Circuit, however, the Eighth Circuit determined that the *Central Hudson* test was applicable to assess the constitutionality of check-off programs.[71] Applying that test, the court still found the program violative of the First Amendment because the government's interest in promoting the economic health of the beef industry was not sufficiently substantial to warrant the free speech restrictions.[72] The Supreme Court granted certiorari to review the Eighth Circuit's holding.[73] Thus, the constitutionality of various check-off programs was already a "hot topic" when the Third Circuit decided on the validity of the Dairy Act's program.[74]

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cial speech cases. *See id.* (distinguishing situation in Pork Act where producers forced to express disagreeable message with typical commercial speech case where limit is placed on ability of producers to express certain message). In *Michigan Pork Producers Ass'n*, the plaintiffs were compelled to express a disagreeable message. *See id.* ("Even assuming that the advertising funded by the Act is indeed commercial speech, the more lenient standard of review applied to limits on commercial speech has never been applied to speech—commercial or otherwise—that is compelled."). The court went on to state, "[i]t is one thing to force someone to close her mouth; it is quite another to force her to become a mouthpiece." *Id.* As a consequence, the court deemed the Pork Act unconstitutional, governed by the analysis set forth in *United Foods*. *See id.* (stating holding).

69. *See* Livestock Mktg. Ass'n v. U.S. Dep't of Agric., 335 F.3d 711, 713 (8th Cir. 2003) (holding 7 U.S.C. §§ 2901-2911 unconstitutional), *vacated and remanded by* Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055 (2005).

70. *See id.* at 717 (analogizing Mushroom Act to Beef Act and finding substantial similarity, thus making *United Foods* controlling).

71. *See id.* at 721-22 (deciding that *Central Hudson* test was appropriate). The court noted that the Supreme Court in *Glickman* did not directly address the proper standard and, thus, there was no complete answer. *See id.* at 722 (noting lack of definitive answer by Supreme Court regarding whether *Central Hudson* test was appropriate). The Eighth Circuit believed, however, that if the government relied on the *Central Hudson* test in *United Foods*, that the Supreme Court would have applied the *Central Hudson* test to the facts of the case. *Id.* The court acknowledged the factual differences between *Central Hudson* and the case at bar—namely, that *Central Hudson* involved a restriction on speech while the case at bar involved compelled speech. *See id.* (acknowledging factual distinctions). Despite this difference, the court still found *Central Hudson* to be apposite. *See id.* ("In our view, it is more significant that *Central Hudson* and the case at bar both involve government interference with private speech in a commercial context.").

72. *See id.* at 725-26 (finding Beef Act unconstitutional under *Central Hudson* test).

73. *See* Veneman v. Livestock Mktg. Ass'n, 124 S. Ct. 2389 (2004) (agreeing to hear Beef Act case).

74. For a discussion of recent appellate court decisions preceding *Cochran* that addressed the constitutionality of compelled funding under check-off programs, see *supra* notes 63-72 and accompanying text.

Additionally, after the *Cochran* decision, the Fifth Circuit released a similar opinion striking down a Louisiana law that required alligator hunters and farmers to pay various fees, some of which went to the funding of generic advertising that the appellants found objectionable. *See* Pelts & Skins, LLC v. Landreneau, 365

III. THIRD CIRCUIT JURISPRUDENCE

A. United States v. Frame

The Third Circuit had once before considered the constitutionality of an agricultural check-off program.[75] Before deciding *Cochran v. Veneman*, the Third Circuit addressed the constitutionality of a check-off program fifteen years earlier in *United States v. Frame*.[76] The Third Circuit decided *Frame* well before the Supreme Court decided *Glickman* and *United Foods*.[77] In *Frame*, the court analyzed the forced subsidies in accordance with the Beef Act—the same statute that both the Eighth Circuit and Supreme Court recently analyzed.[78] The Third Circuit held that the mandatory advertising assessments promulgated pursuant to the Beef Act did not violate the First Amendment rights of disagreeing farmers.[79]

F.3d 423, 425 (5th Cir. 2004) (holding that using fees to fund generic advertising violated First Amendment), *vacated and remanded by* Landreneau v. Pelts & Skins, LLC, 125 S. Ct. 2511 (2005). Noting the contrasting Supreme Court precedents in *Glickman* and *United Foods*, the Fifth Circuit had to "'determine whether Louisiana alligator producers [were] more like mushroom producers than like peach producers.'" *Id.* at 432 (quoting Pelts & Skins, LLC v. Jenkins, 259 F. Supp. 2d 482, 483 (M.D. La. 2003)). The Fifth Circuit held that the alligator marketing program resembled *United Foods* more than *Glickman* because the "alligator producers are not part of a collective association akin to *Glickman*'s marketing cooperative." *Id.* at 433. The court held that program violated the First Amendment, even though a majority of the funds went to other programs beyond the generic marketing. *See id.* at 434 (finding fact that substantial funds went to other programs besides advertising was not dispositive). The Fifth Circuit so held because the "key element of *Glickman*" was absent, which is the lack of a "highly collectivized marketing association." *Id.*

75. *See* United States v. Frame, 885 F.2d 1119 (3d Cir. 1989) (analyzing First Amendment implications of Beef Promotion Act), *abrogated by* Cochran v. Veneman, 359 F.3d 263 (3d Cir. 2004) .

76. *Id.*

77. For a further discussion of the Supreme Court's holdings in *Glickman* and *United Foods*, see *supra* notes 25-62 and accompanying text.

78. *See Frame*, 885 F.2d at 1121-22 (presenting issue). For a further discussion of the Eighth Circuit's decision in *Livestock Marketing Ass'n*, finding the Beef Act unconstitutional, see *supra* notes 69-72 and accompanying text. For a further discussion of the Supreme Court's decision that the Beef Act is constitutional, see *infra* notes 160-77 and accompanying text.

79. *See Frame*, 885 F.2d at 1122 (upholding district court's determination that no constitutional provisions were violated). The Third Circuit began its analysis in *Frame* by presenting the necessary background into the statutory and regulatory scheme. *Id.* at 1122-24. Among the notable features was that the Beef Promotion and Research Program does not receive direct federal funding. *Id.* at 1122. Congress enacted the Beef Promotion Act as a "self-help" measure for the beef industry to stimulate its own markets. *See id.* (explaining congressional purpose for Act). The Act permitted the Secretary of Agriculture to promulgate orders to establish the "self-help" program and provide for its funding through mandatory assessments. *See id.* (explaining Secretary of Agriculture's role). For the factual and procedural background, see *id.* at 1124-25.

Recognizing that the Supreme Court had positively conferred upon citizens the right to refrain from speaking,[80] the court noted that compelled contributions to groups who participate in speech implicates First Amendment liberties.[81] Next, the Third Circuit addressed the government's argument that the assessments funded "government speech," a category of speech that does not violate dissenting persons' First Amendment rights.[82] Government speech receives unique protection because a representative government that speaks on behalf of the whole population is bound to have dissenters; these dissenters have the opportunity to hold elected officials accountable through the political process.[83] The *Frame* court decided, however, that the compelled funding of speech under the Beef Act was not government speech.[84] The court's main thrust was that the Cattleman's Board, the group compelling the funding, represents a narrower population than does the government—the Board represents only a small segment of the population holding common interests, whereas the government represents the whole population.[85]

80. *See id.* at 1130 (citing Wooley v. Maynard, 430 U.S. 705 (1977); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)). For further detail on this line of Supreme Court precedent, see *supra* note 39 and accompanying text.

81. *See Frame*, 885 F.2d at 1130 (citing Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)); *see also* Galda v. Rutgers, 772 F.2d 1060, 1066 (3d Cir. 1985) (holding that requiring students to fund outside corporation that participates in lobbying violated First Amendment rights of disagreeing students).

82. *See Frame*, 885 F.2d at 1131-33 (addressing "government speech" argument); *see also* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 541 (2001) ("[V]iewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker . . . or instances . . . in which the government 'used private speakers to transmit specific information pertaining to its own program.'") (citation omitted).

83. *See Frame*, 885 F.2d at 1131 ("Indeed, citizens of a country with a representative form of government have agreed to elect individuals to official posts who will, and must, speak and act on behalf of the entire population, including on behalf of those who disagree with all or some of the government's programs."); *see also Velazquez*, 531 U.S. at 541-42 ("'When the government speaks, for instance to promote its own policies or to advance a particular idea, it is, in the end, accountable to the electorate and the political process for its advocacy. If the citizenry objects, newly elected officials later could espouse some different or contrary position.'" (quoting Bd. of Regents of Univ. of Wis. Sys. v. Southworth, 529 U.S. 217, 235 (2000))). Additionally, another rationale is that the nexus between any government message and a dissenting individual is attenuated. *See Frame*, 885 F.2d at 1132 (contrasting attenuated nexus of government speech with closer nexus between individual and publicly identified group, such as union in *Abood*).

84. *See Frame*, 885 F.2d at 1132 (rejecting government speech argument).

85. *See id.* at 1132-34 (applying government speech rationale to present facts and finding them incompatible). The Third Circuit relied heavily on Justice Powell's concurrence in *Abood* for its analysis. *See id.* at 1131-34 (examining Justice Powell's concurrence in *Abood*). Most important was Powell's footnote thirteen to that concurrence, in which Justice Powell stated the following:

> Compelled support of private association is fundamentally different from compelled support of government. Clearly, a board does not need to demonstrate a compelling state interest every time it spends a taxpayer's money in ways the taxpayer finds abhorrent. But the reason for permit-

Thus, the court held that the Act must pass First Amendment muster.[86]

Because the appellant, Frame, conceded that the advertising was commercial speech—a lesser protected category—the Third Circuit applied the less exacting *Central Hudson* test as the standard of scrutiny.[87] In doing so the court evaluated the following factors: (1) whether the state showed a "substantial government interest"; (2) whether the regulatory technique was proportional to the interest; and (3) whether "the incursion on commercial speech [was] 'designed carefully to achieve the State's goal.'"[88] A competing concern also arose because Frame asserted his right to be free from compelled association—pursuant to Supreme Court precedent.[89] As a result, the Third Circuit felt his claim deserved a higher level of scrutiny than the typical commercial speech claim.[90] Despite the heavy burdens on the government, the court found that the substantial government interest in maintaining strong beef markets outweighed the slight encroachment on free speech rights.[91]

Judge Sloviter wrote a vehement dissent.[92] She did not think that the Beef Act was a regulatory program, and argued that the advertising of a product alone "[did] not fit within the accepted meaning of 'regulation.'"[93] Additionally, she felt that the Act was not carefully tailored because the burden on speech was greater than necessary in light of the

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> ting the government to compel the payment of taxes and to spend money on controversial projects is that the government is representative of the people. The same cannot be said of a union, which is representative only of one segment of the population, with certain common interests. The withholding of financial support is fully protected in this context.

Abood, 431 U.S. at 259 n.13.

86. *See Frame*, 885 F.2d at 1133 (agreeing with Justice Powell's analysis).

87. *See id.* (announcing use of *Central Hudson* test).

88. *See id.* (listing elements of *Central Hudson* test).

89. For a further discussion on the Supreme Court precedent concerning compelled association, see *supra* note 43 and accompanying text.

90. *See Frame*, 885 F.2d at 1133-34 (noting that appellant's assertion was supported by Supreme Court's *Abood* decision, thus exacting higher scrutiny). Judge Scirica, writing for the majority, stated that the court would only uphold the Beef Promotion Act if it served "compelling state interests, that are ideologically neutral, and that cannot be achieved through means significantly less restrictive of free speech or associational freedoms." *Id.* at 1134.

91. *See id.* at 1134-37 (balancing opposing interests and deciding in favor of government). The majority also noted that the appellant's disagreement over the advertisements was merely over strategy. *See id.* at 1137 (stating same). Judge Sloviter, in her dissent, stated that the reason for objecting was totally irrelevant. *See id.* at 1145 (Sloviter, J., dissenting) ("I believe it is immaterial whether Frame's objection is for ideological reasons or libertarian ones, or even whether such reasons may also be in part colored by economic considerations.").

92. *See id.* at 1143-49 (Sloviter, J., dissenting) (refuting majority's constitutional analysis).

93. *Id.* at 1144 (Sloviter, J., dissenting).

government's general interest in the welfare of the beef trade.[94] She also disagreed with the compelled nature of the funding, even if the speech could be classified as "commercial."[95] Then, applying the *Central Hudson* test, Judge Sloviter concluded that the government's "general interest in the health of the beef industry" was not substantial enough to justify the forced payments, thus failing even under a lower level of scrutiny and negating the need for Judge Slovitor to enter into an analysis under the more stringent compelled association standard.[96] *Frame* was the Third Circuit's last check-off program decision until it decided *Cochran v. Veneman*.[97]

B. Cochran v. Veneman

In *Cochran*, the Third Circuit reviewed the constitutionality of the Dairy Act,[98] which compelled small dairy farmers to fund the famous "Got Milk?" advertisements.[99] The appellants, Brenda and Joseph Cochran, were small dairy farmers who did not belong to any dairy marketing or manufacturing cooperatives and were required to pay assessments to fund the "Got Milk?" advertisements.[100] The Cochrans practiced "traditional" farming methods, a different procedure for producing milk than that used by most large commercial milk farmers.[101] The Cochrans felt that "tradi-

94. *See id.* (Sloviter, J., dissenting) (criticizing lack of narrow tailoring of scheme); *see also id.* at 1147 (Sloviter, J., dissenting) ("While the government has a general interest in the health of the beef industry, it does not follow that the government has a substantial interest in compelling the beef industry to make and support such a promotion campaign.").

95. *See id.* at 1145 (Sloviter, J., dissenting) ("It can no more compel me to advertise a product on . . . my home than it can compel me to carry a similar sign on . . . my jacket. Similarly, it cannot compel me to contribute my money to permit a private group to perform that function.").

96. *See id.* at 1146-48 (Sloviter, J., dissenting) (distinguishing significant government interest in anti-smoking ads from statute in question).

97. 359 F.3d 263 (3d Cir. 2004), *vacated and remanded by* Johanns v. Cochran, 125 S. Ct. 2512 (2005) (vacating and remanding on government speech grounds).

98. 7 U.S.C. §§ 4501-4538 (2000). For a quotation of the Dairy Act, see *supra* note 5.

99. *See Cochran*, 359 F.3d at 266 (framing issue as "whether a federal statute may compel a small dairy farm in Pennsylvania to help pay for the white-mustache milk advertisements and other dairy promotions"). The compelled assessments also finance the popular "Ahh, the Power of Cheese" advertising campaign. *See id.* at 271 (noting use of compelled assessments).

100. *See id.* at 266 (describing appellants). The Cochrans decided on their own how much milk to produce, sell and market. *See id.* (same). Under the Dairy Act, all milk producers in the United States must contribute mandatory assessments of fifteen cents per hundredweight of milk sold. *See id.* (illustrating mechanics of Dairy Act). Milk producers pay these assessments to the "Dairy Board," which was created by the order of the Secretary of Agriculture pursuant to the Act. *See id.* (same). Under the Act, dissenting milk producers cannot abstain from paying the assessments. *See id.* (same).

101. *See id.* at 266-67 (particularizing traditional farming methods). Judge Aldisert, who wrote the opinion of the court, labeled "traditional" farming methods as less aggressive than large-scale commercial methods. *See id.* (discussing distinc-

tional" methods produced "healthier cows, a cleaner environment and superior milk."[102] They objected to the "Got Milk?" campaign because they felt that the advertisements projected a message that milk is a generic product with no distinctions between producers—a message they emphatically opposed.[103]

The Cochrans claimed that the forced advertisement subsidy was unconstitutional pursuant to the Supreme Court's holding in *United Foods*.[104] The Government countered by arguing that the Act was constitutional under *Glickman*.[105] Additionally, the Government contended that the "Got Milk?" advertisements were government speech and thus immune from First Amendment violations.[106]

The court presented its analytical roadmap, which first addressed whether the advertisements were government speech.[107] If the ads were not government speech, but rather commercial speech, then the court would next have to address whether the mandatory assessments violated the appellants' First Amendment right to free speech and association.[108] In weighing the First Amendment implications, the court had to confront the question of the proper standard of scrutiny to use for *compelled* commercial speech.[109] In the end, the court held that the compelled assessments did not constitute government speech and violated the Cochrans' First Amendment rights.[110] In so holding, the court recognized that the Supreme Court rulings in *Glickman* and *United Foods* "severely dilute the precedential vitality" of the Third Circuit's central holding in *Frame*, and that it is no longer good law.[111]

In *Cochran*, the court began its analysis by looking closely at the *Glickman* and *United Foods* decisions in order to see "the side on which the axe

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tion between traditional and commercial farming methods). "Traditional" methods allow cows more room to graze and the farmers do not use the recombinant Bovine Growth Hormone (rBGH), a practice considered unhealthy for both the cow and consumer by farmers like the Cochrans. *See id.* (same). For more detail about rBGH, see *id.* at 267 n.2.

102. *Id.* at 267.

103. *See id.* (illuminating Cochrans' main objection to "Got Milk?" advertisements).

104. *See id.* (advancing Cochrans' position). For further discussion of the Supreme Court's decision in *United Foods*, see *supra* notes 49-62 and accompanying text.

105. *See Cochran*, 359 F.3d at 267 (arguing that *Glickman* was correct controlling Supreme Court precedent). The Government averred that the Dairy Act was "a species of economic regulation that does not violate the First Amendment." *Id.* For further discussion of the Supreme Court's decision in *Glickman*, see *supra* notes 25-48 and accompanying text.

106. *See Cochran*, 359 F.3d at 267 (presenting government speech argument).

107. *See id.* at 268 (describing court's analytical process).

108. *See id.* (laying framework for First Amendment analysis).

109. *See id.* (noting need to decide upon proper level of scrutiny).

110. *See id.* (stating holding).

111. *See id.* (illuminating lack of precedential authority of *Frame*'s primary holding after *Glickman* and *United Foods*).

must fall."[112] Looking at the issue through the prism of *Glickman* and *United Foods*, the court felt it was vital to look at the "broader statutory scheme" behind the Dairy Act.[113] The court needed to determine whether the dairy farmers were bound together by statute to "'market their products according to cooperative rules' for purposes other than advertising, or speech."[114] If they were, then *Glickman* would control; if they were not, then *United Foods* would control.[115]

The court went on to examine the Dairy Act in detail.[116] The Dairy Act's stated purpose was to ensure "an orderly procedure for financing . . . and carrying out a coordinated program of promotion" in order to strengthen the industry.[117] The Dairy Act was "a stand-alone law" that was not passed with any other federal regulatory scheme.[118] Pursuant to the statute, the Secretary of Agriculture created a "Dairy Board" to collect the mandatory assessments from all United States milk producers in order to fund the Dairy Promotion Program.[119] Under the Act, the Secretary of Agriculture's role was to ensure that the Dairy Promotion Program was properly carried out under the Dairy Act.[120]

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112. *See id.* at 268-70 (examining *Glickman* and *United Foods*). For a further discussion of the Supreme Court's decisions in *Glickman* and *United Foods*, see *supra* notes 25-62 and accompanying text.

113. *See Cochran*, 359 F.3d at 270 (examining Dairy Act, which, among other things, presented statutory schemes for promoting agricultural commodities). This need to look at the broader statutory scheme was in direct response to the Supreme Court's guidance in *Glickman*. *See* Glickman v. Wileman Bros. & Elliott, Inc., 521 U.S. 457, 469 (1997) (stressing importance of statutory scheme).

114. *Cochran*, 359 F.3d at 270 (quoting United States v. United Foods, 533 U.S. 404, 412 (2001)). For a further discussion of the essential distinction between *Glickman* and *United Foods*, see *supra* note 58-59 and accompanying text.

115. For a discussion of the Supreme Court's rationale for distinguishing between the statutory schemes in *Glickman* and *United Foods*, see *supra* notes 58-62 and accompanying text.

116. *See Cochran*, 359 F.3d at 270-71 (explaining workings of Dairy Act).

117. *Id.* at 270 (quoting 7 U.S.C. § 4501(b) (2000)) (expounding purpose of Dairy Act). For examples of similar agricultural check-off programs, see *supra* notes 7-9 and accompanying text.

118. *See Cochran*, 359 F.3d at 270 (discussing legislative history of Dairy Act).

119. *See id.* (explaining logistical aspects of Dairy Act). The Cochrans had to pay between $3500 and $4000 per year in assessments. *Id.* $4000 represents about ten percent of the Cochrans' yearly income. *See* Edwards, *supra* note 24 (reporting financial burdens placed on Cochrans from paying mandatory subsidies). The court indicated that the Dairy Promotion website stressed that the check-off programs are not a governmental program, funded by taxpayers, but rather "they are businesses with governmental oversight" that are funded by the dairy producers. *See Cochran*, 359 F.3d at 271 (quoting Dairy Promotion Program website).

120. *Cochran*, 359 F.3d at 271. The Secretary's functions are also funded by the compelled assessments. *See* 7 U.S.C. § 4504(g)(2) (discussing Secretary of Agriculture's oversight functions). The dairy producers actually have control, through a referendum process, to decide whether the Dairy Promotion Program will continue. *See Cochran*, 359 F.3d at 271 (citing 7 U.S.C. § 4506(a)) (acknowledging that dairy farmers do have some means for controlling Dairy Promotion Program).

Besides the Dairy Act, the industry was "subject to a patchwork of federal and state regulatory laws."[121] The court noted that it was crucial to examine these other statutes to determine whether *Glickman* should control the case.[122] The district court below found that through the Dairy Act and these other statutes, a cooperative arrangement existed, which brought the case within the "rubric of *Glickman*."[123] The Third Circuit felt differently because none of these various other laws affected *fluid* milk producers like the Cochrans.[124]

After outlining the necessary background, the court analyzed the gravamen of the appeal—the First Amendment issues.[125] The initial issue was whether the Dairy Act constituted government speech.[126] This is an issue that the Supreme Court had yet to decide in the context of check-off programs at the time of this appeal.[127] As noted before, the Third Circuit already addressed this issue in *Frame*, deciding that the compelled assess-

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121. *Cochran*, 359 F.3d at 271. Among the relevant laws that the district court noted were: (1) AMAA, 7 U.S.C. § 608c (2000); (2) the Agriculture Act of 1949, 7 U.S.C. § 1446 (2000); (3) the import control regulations pursuant to 19 U.S.C. § 1202 (2000); and (4) the Capper-Volstead Act, 7 U.S.C. § 291 (2000). *See id.* at 271-72 (listing federal laws that district court below deemed relevant to analysis).

122. *See id.* at 272 (announcing importance of analyzing these statutes in conjunction with Dairy Act in order to determine whether cooperative type arrangement exists, like that found in *Glickman*).

123. *See id.* (noting district court's rationale).

124. *See id.* at 272-73 (analyzing why various other federal statutes do not apply to fluid milk producers). Specifically, the AMAA only applied to "handlers" of milk, and not "producers." *See id.* at 272 (distinguishing milk "handlers" from "producers"). The Agriculture Act of 1949 did not apply to producers of "fluid milk," which was what the Cochrans produced. *See id.* (explaining why Agriculture Act of 1949 did not apply). Likewise, the import control regulations did not apply to "fluid milk." *See id.* at 272-73 (detailing inapplicability of import controls to fluid milk producers). Lastly, the Cochrans did not belong to any cooperative allowed by the Capper-Volstead Act. *See id.* at 273 (explaining that Capper-Volstead Act, which allows certain dairy producers to enter manufacturing and marketing cooperatives without violating antitrust laws, does not apply to Cochrans because Cochrans were not members of such cooperatives).

125. *See id.* (indicating direction of analysis).

126. *See id.* (presenting threshold "government speech" issue). For further detail on the "government speech" doctrine, see *supra* notes 82-83 and accompanying text.

127. *See Cochran*, 359 F.3d at 273 (noting lack of previous Supreme Court guidance in this area). In *United Foods*, the Supreme Court did not address whether the compelled speech pursuant to the Mushroom Act was government speech because the government failed to raise the issue in the appellate court. *See* United States v. United Foods, Inc., 533 U.S. 404, 416-17 (2001) (sidestepping "government speech" issue). The Supreme Court, however, did address this issue this past term, holding that the analogous check-off program pursuant to the Beef Act was government speech. *See* Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055, 2061-66 (2005) (stating holding). For more discussion on the current state of this area of law after *Johanns*, see *infra* notes 156-79 and accompanying text.

ments of the Beef Act did not constitute government speech.[128] This holding was consistent with the above-mentioned circuit findings that the compelled assessments of the respective check-off programs did not garner the label of government speech.[129] The Third Circuit determined that the Dairy Promotion Program was "in all material respects the same" as the Beef Promotion Program under the Beef Act.[130] Thus, pursuant to its *Frame* precedent, the Secretary of Agriculture's oversight of the program was "not sufficient to transform the dairy industry's self-help program into 'government speech.'"[131] Even though the subsequent Supreme Court rulings in *Glickman* and *United Foods* eviscerated the essential First Amendment holding of *Frame*, the Third Circuit felt that *Frame*'s

128. *See supra* notes 82-86 and accompanying text (discussing government speech analysis by Third Circuit in *Frame*); *see also Cochran*, 359 F.3d at 273 (acknowledging that Third Circuit addressed government speech issue in *Frame*).

129. *See* Mich. Pork Producers Ass'n v. Veneman, 348 F.3d 157, 161-62 (6th Cir. 2003) (addressing government speech argument in context of subsidies compelled by Pork Act), *vacated and remanded by* Mich. Pork Producers Ass'n v. Campaign for Family Farms, 125 S. Ct. 2511 (2005). The Sixth Circuit declined to treat the compelled subsidies of the Pork Act's check-off program as governmental speech because the pork industry retained "extensive control" over the promotional activities of the Act. *See id.* at 161 (discussing rationale). The court raised three points to support this conclusion: (1) the "primary purpose" of the Act was to strengthen the pork market; (2) the funding for the program did not come from the general tax revenue, but from only the mandatory subsidies; and (3) the government only had limited oversight over the program. *See id.* at 161-62 (supporting contention that speech in question was not government speech). The court found the role of the government to be more like a facilitator of private speech as opposed to actually being the speaker. *See id.* at 162 ("In sum, the costs and content of the speech in question are almost completely the responsibility of members of the pork industry. The First Amendment does not lie dormant merely because the government acts to consolidate and facilitate speech that is otherwise wholly private.").

Likewise, the Eighth Circuit recently found that the ads funded by compelled assessments in the Beef Act, the same statute as analyzed by Third Circuit in *Frame*, were not government speech. *See* Livestock Mktg. Ass'n v. U.S. Dept. of Agric., 335 F.3d 711, 719-20 (8th Cir. 2003) (conducting government speech analysis), *vacated and remanded by* Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055 (2005) (rejecting Eighth Circuit's contention that check-off program was not government speech). The court stated that this was a case of compelled speech, which is fundamentally different than governmental speech. *See id.* at 720 (expounding difference between government speech cases and compelled speech cases); *see also* Pelts & Skins, LLC v. Landreneau, 365 F.3d 423, 429-32 (5th Cir. 2004) (finding that compelled funding for generic alligator advertisements did not constitute government speech), *vacated and remanded by* Landreneau v. Pelts & Skins, LLC, 125 S. Ct. 2511 (2005). For a further discussion on how the Supreme Court refuted the government speech analysis of these multiple circuit courts, see *infra* notes 156-79.

130. *See Cochran*, 359 F.3d at 274 (finding Beef Promotion Program analogous to Dairy Promotion Program).

131. *Id.* Judge Aldisert pointed out that the "government itself describes the Dairy Promotion Program as a non-governmental program" on the dairy check-off program website. *See id.* (supporting conclusion that Dairy Act does not constitute government speech).

government speech analysis was still valid precedent.[132] Hence, the ads pursuant to the Dairy Act were commercial speech—subject to First Amendment scrutiny.[133]

Per *United Foods*, the court's next task was to determine whether the dairy farmers were "'bound together and required by the statute to market their products according to cooperative rules[,]' for purposes other than advertising, or speech."[134] The main question was whether the Dairy Act compelled speech that was ancillary to a broader scheme that could be classified as "economic regulation," which receives a "'strong presumption of validity,'" or whether the primary purpose behind the Act was the speech itself—in other words, whether the Dairy Act was more like *Glickman* or *United Foods*.[135] The circuit held that the Dairy Act was more akin to *United Foods*.[136]

Of significant importance was the fact that even though the dairy industry was "subject to a patchwork of state and federal laws," the Dairy Act did not force milk farmers to join an association such as a union, state bar or "the collective enterprise at issue in *Glickman*."[137] The court noted that the Act was a "free-standing promotional program" that was "not ancillary to any collective enterprise or compelled association with a non-speech purpose."[138] Additionally, the court declared that congruous to the Mushroom Act in *United Foods*, the Dairy Act's primary purpose was speech.[139] Finding that the Cochrans' First Amendment rights were implicated, the court then focused on the proper standard of scrutiny.[140]

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132. *See id.* ("Although this court's First Amendment discussion and ultimate holding in *Frame* have been abrogated by *Glickman* and *United Foods*, none of the Court's subsequent decisions regarding 'government speech' undermine our analysis of that issue in *Frame*.").

133. *See id.* (holding that case at bar was not government speech case and thus subject to First Amendment review).

134. *See id.* at 274-75 (explicating next step in analysis) (citations omitted). For a further discussion of *United Foods*, see *supra* notes 49-62 and accompanying text.

135. *See Cochran*, 359 F.3d at 275 (distilling applicable law). The court noted that an individual's objection to the speech may be minor yet still violate the First Amendment. *See id.* ("'[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented.'" (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993))).

136. *See id.* at 275-76 (explaining rationale).

137. *See id.* at 275 (distinguishing present case from *Glickman*). The court felt that "*United Foods* made clear that *Glickman* applied only in circumstances similar to *Abood* and *Keller*." *Id.* For a further discussion of the *Abood/Keller* line of cases, see *supra* note 43 and accompanying text.

138. *Cochran*, 359 F.3d at 275.

139. *See id.* at 276 (analogizing Mushroom Act with Dairy Act); *see also id.* at 276 n.11 (comparing Congress's declared purpose for both Mushroom Act and Dairy Act).

140. *See id.* at 276 (recognizing that free speech and association rights are not absolute and corresponding need to determine proper standard of scrutiny).

The Third Circuit characterized the Dairy Act as "compelled commercial speech."[141] The Supreme Court has not settled on what should be the proper standard for compelled commercial speech cases and the circuits are split on the issue.[142] The court then listed four current possible tests: (1) the *Central Hudson* test; (2) the "germaneness" test from compelled speech cases; (3) the adaptation of the commercial speech standard; and (4) the stringent standard for associational rights that the Third Circuit used in *Frame*.[143] The Third Circuit then summarized the tests, mentioning that the Supreme Court, in *United Foods*, did not resolve the question of whether the *Central Hudson* test was applicable to *compelled* commercial speech cases, and that the *United Foods* Court instead "seemingly applied the 'germaneness' test."[144] The Third Circuit followed the Supreme Court's lead and decided to stay clear of the *Central Hudson* controversy.[145] Echoing the sentiments from Judge Sloviter's dissent in *Frame*, the circuit court found "that the government's interest in promoting the dairy industry is not sufficiently substantial" to allow the current encroachment on the Cochrans' First Amendment rights.[146] In this way, the court was able to hold that there was a First Amendment violation under any level of scrutiny—including *Central Hudson*—and that this case is directly analogous with *United Foods*.[147]

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141. *Id.*

142. *See id.* at 277 (commenting on current unresolved nature of what should be proper standard for compelled commercial speech cases).

143. *See id.* (particularizing current variations on standard of scrutiny).

144. *See id.* at 277-79 (surveying various tests, including uncertain state of *Central Hudson* test, in context of compelled commercial speech cases after *United Foods* decision). For a further discussion of the criticisms and uncertainty of the validity of the *Central Hudson* test, see *supra* note 53 and accompanying text. *See also* Brief for Respondents at 43 n.29, Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055 (2005) (Nos. 03-1164, 03-1165) (focusing attention on uncertain status of *Central Hudson* test, even among members of current Supreme Court). The Third Circuit phrases the *Central Hudson* test as follows: "(1) the state must 'assert a substantial government interest'; (2) 'the regulatory technique must be in proportion to that interest'; and (3) the incursion on commercial speech 'must be designed carefully to achieve the State's goal.'" *Cochran*, 359 F.3d at 277 (citing Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980)).

145. *See Cochran*, 359 F.3d at 279 ("In light of the reluctance of the Supreme Court in *United Foods* to enter the controversy over the applicable scrutiny for compelled commercial speech cases . . . we will follow suit.").

146. *See id.* at 278-79 (refuting contention that government has substantial enough interest in general health of dairy industry to warrant First Amendment intrusions). The court felt that the Supreme Court's analysis in *United Foods* vindicated Judge Sloviter's dissenting opinion in *Frame*. *See id.* at 279 (equating *United Foods* analysis with Judge Sloviter's analysis in her *Frame* dissent).

147. *See id.* at 279-80 ("Measured by any degree of scrutiny set forth in the foregoing discussion, we conclude that this case runs on all fours with the teachings and holding of *United Foods*, and accordingly hold that the [Dairy Act] does not survive the First Amendment Challenge . . . .").

Judge Rendell issued a concurring opinion.[148] She felt that because the assessments in this case did not "pass muster" under *United Foods*, there was no need for the court to determine the extent of the governmental interest for purposes of the *Central Hudson* test.[149] She opined that after *United Foods*, there appears to be a basic two-part inquiry[150]—first, whether the plaintiffs are required to be bound together "'to market their products according to cooperative rules,'" and second, whether the compelled assessments further any other non-speech purpose.[151] Theoretically, one may fail the first prong and the compelled assessments may still be permitted if there is a sufficient relationship between the assessments and a valid non-speech interest (i.e., germane to non-speech purpose).[152] In this case, however, the Act failed both prongs, so Judge Rendell felt that the speech was "purely 'compelled speech,' forbidden by *United Foods* under *any* level of scrutiny."[153] For this reason, Judge Rendell declared that the court's discussion about the correct level of scrutiny was unnecessary dicta.[154] Regardless of this dispute over the proper level of scrutiny, the central decision of the Third Circuit in *Cochran* signaled a definite victory in the area of free speech.[155]

IV. IMPACT

Cochran was a triumph for the First Amendment.[156] "The [Third Circuit] made clear that just because an industry is regulated doesn't mean

148. *Id.* at 280-81 (Rendell, J., concurring).

149. *See id.* at 280 (Rendell, J., concurring) (finding court's governmental interest analysis unnecessary). Judge Rendell pointed to the fact that the Supreme Court itself has before cast doubt on the need for "engaging in a *Central Hudson* analysis" and that it appears especially unnecessary after *United Foods*. *See id.* (Rendell, J., concurring) (stating same). She averred that the Supreme Court in *United Foods* appeared to "explicitly endorse the . . . *Abood/Keller* germaneness test." *Id.* at 280 n.14 (Rendell, J., concurring). She also found the Sixth Circuit's arguments persuasive in *Michigan Pork Producers Ass'n v. Veneman*, 348 F.3d 157, 163 (6th Cir. 2003), where the Sixth Circuit rejected using the *Central Hudson* test for analyzing the compelled assessments under the Pork Act. *See Cochran*, 359 F.3d at 280 n.15 (Rendell, J., concurring) (approving Sixth Circuit's analysis to analogous case).

150. *See Cochran*, 359 F.3d at 281 (Rendell, J., concurring) (commencing two-part inquiry).

151. *See id.* (Rendell, J., concurring) (specifying prongs of dual inquiry).

152. *See id.* (Rendell, J., concurring) (hypothesizing potential outcomes under dual inquiry).

153. *See id.* (Rendell, J., concurring) (applying facts to dual inquiry).

154. *See id.* (Rendell, J., concurring) (noting that any analysis of correct level of scrutiny, given facts of case, was unnecessary).

155. For a discussion of the impact of *Cochran*, see *infra* notes 156-79 and accompanying text.

156. *See* Shannon P. Duffy, *First Amendment Fears Curdle 'Got Milk?' Effort*, LEGAL TIMES, Mar. 1, 2004, at 7 (paraphrasing Cochrans' lawyer, Steven Simpson).

that its members lose their First Amendment rights."[157] In doing so, the Third Circuit joined the emerging trend among the circuit courts holding similar check-off programs unconstitutional.[158] This triumph, however, was short-lived.[159] The Supreme Court granted certiorari for *Cochran* and vacated and remanded the decision so that it may be reconsidered in light of the Court's latest word on check-off programs—*Johanns v. Livestock Marketing Ass'n.*[160] In that case, decided this past term, the Court held that the Beef Act is constitutional because it is government speech.[161] On a collective level, the consequences of *Livestock Marketing Ass'n* are far reaching—the decision sounds a major victory for the United States Department of Agriculture.[162] The omnipresent and contentious check-off program litigation that has pervaded many agricultural sectors is now likely to be settled in the favor of the government.[163]

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157. *Id.* (quoting Cochrans' lawyer, Steven Simpson). Simpson continued by stating, "[s]peech wouldn't be free if government could require people to convey officially sanctioned messages. The same principle applies to compelling people to pay for speech with which they disagree." *Id.*

158. *See* Scott Kilman, *U.S. Court Rejects Mandatory Levy on Dairy Farmers*, WALL ST. J., Feb. 25, 2004, at D8 ("The ruling is the latest in a string of court decisions to go against so-called farmer check-off programs that long have funded some of the best-known generic ad campaigns in the U.S., ..."). Along with the Sixth Circuit, which struck down the compelled assessments that brings us "Pork: The Other White Meat," or the Eighth Circuit, which voided the assessments responsible for "Beef: Its What's for Dinner," the Third Circuit substantiated the cherished First Amendment rights residing within objecting farmers. *See* Mich. Pork Producers Ass'n v. Veneman, 348 F.3d 157, 159 (6th Cir. 2003) (striking down compelled assessments pursuant to Pork Act because unconstitutional), *vacated and remanded by* Mich. Pork Producers Ass'n v. Campaign for Family Farms, 125 S. Ct. 2511 (2005); Livestock Mktg. Ass'n v. U.S. Dept. of Agric., 335 F.3d 711, 725-26 (8th Cir. 2003) (holding Beef Act unconstitutional), *vacated and remanded by* Johanns v. Livestock Mktg. Ass'n, 125 S. Ct. 2055 (2005). For details of *Michigan Pork Producers Ass'n*, see *supra* notes 65-68 and accompanying text. For a discussion of *Livestock Marketing Ass'n*, see *supra* notes 69-73 and accompanying text.

159. *See* Johanns v. Cochran, 125 S. Ct. 2512, 2512 (2005) (vacating and remanding Third Circuit's decision in *Cochran* in light of Supreme Court's recent decision declaring Beef Act constitutional).

160. *See* 125 S. Ct. 2055, 2061-66 (2005) (declaring constitutionality of Beef Act based on government speech theory). This decision was highly anticipated by many agricultural industries because of its potential to finally resolve the check-off controversy one way or the other. *See* Tony Mauro, *Supreme Court Says Beef Producers Can Be Forced to Fork Over for Ads*, LEGAL TIMES, May 24, 2005 (noting that many similar programs have "'been in disarray and on hold waiting'" for *Livestock Marketing Ass'n*).

161. *See Livestock Mktg. Ass'n*, 125 S. Ct. at 2062 ("The message set out in the beef promotions is from beginning to end the message established by the Federal Government.").

162. *See* Tony Mauro, *High Court Says Beef Is What's for Dinner* (May 24, 2005), *at* http://www.firstamendmentcenter.org/analysis.aspx?id=15308 (quoting Secretary of Agriculture, Mike Johanns, as saying "[t]his is certainly a win for the many producers who recognize the power of pooled resources").

163. *See* First Amendment Ctr. Online, *Quick Look at* Johanns v. Livestock Marketing Association (May 24, 2005), *at* http://www.firstamendmentcenter.org/news.aspx?id=15313&printer-friendly=y ("But this ruling may end most of the liti-

In *Livestock Marketing Ass'n*, the Supreme Court finally addressed the government speech argument; the majority found the Beef Act to be government speech, which precluded the need to further analyze the previous standard of scrutiny issues left unresolved by *Glickman* and *United Foods*.[164] Writing for the majority, Justice Scalia explained that the beef check-off program is so intertwined with the government that it undoubtedly qualifies as government speech.[165] This holding rejected the growing consensus among circuit courts that speech pursuant to check-off programs is not actually government speech.[166]

The majority did leave open the potential for future as-applied challenges to check-off programs; courts may hold the programs unconstitutional if the resulting advertisements are attributed to *individual* producers.[167] An as-applied challenge, however, was not possible in *Livestock Marketing Ass'n* because the majority felt the tag line included in the beef industry advertisements—"funded by America's Beef Producers"—was too broad to be attributed to any single producer.[168] That decision will likely instruct the Third Circuit's consideration of the Dairy Act on

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gation in favor of the government programs. By regarding these marketing programs for the first time as government speech, the Court may have effectively taken them off the First Amendment playing field.").

164. *See Livestock Mktg. Ass'n*, 125 S. Ct. at 2058 (2005) (presenting issue of this appeal and how it differs from previous reviews of check-off programs). Justice Scalia succinctly framed up the issue as follows:

> For the third time in eight years, we consider whether a federal program that finances generic advertising to promote an agricultural product violates the First Amendment. In these cases, unlike the previous two, the dispositive question is whether the generic advertising at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny.

Id. at 2058.

165. *See id.* at 2062 ("The message set out in the beef promotions is from beginning to end the message established by the Federal Government."). Of significant importance to the Court was the Secretary of Agriculture's extensive oversight of the program. *See id.* (describing Secretary's inclusive role, specifically addressing duties such as appointing members of Board and approving or rejecting promotional campaigns). Although the Secretary has lots of interaction with the beef industry throughout the entire process, many still felt holding the program as government speech contrasted with the original understanding of the program, which was to have the private industry regulate itself. *See* Josh Flory, *Some Producers Have a Beef with Court's Checkoff Ruling*, COLUMBIA DAILY TRIBUNE, May 24, 2005, *available at* http://www.columbiatribune.com/2005/May/20050524News003.asp (noting critic's complaint that check-off programs were supposed to be run and controlled by producers).

166. For further discussion on the Third Circuit's position, along with the position of other circuit courts, on government speech in the context of check-off programs, see *supra* notes 126-33 and accompanying text.

167. *See Livestock Mktg. Ass'n*, at 2065 n.8 (voicing concern that paid advertisements should not be attributed to *individual* plaintiffs, or else analysis would be different).

168. *See id.* at 2065-66 (finding that tag line was not specific enough to attribute advertisement to any specific producer and, thus, preventing different analysis).

remand because many of the dairy advertisements have a similar tag line that states, "funded by America's Dairy Producers."[169]

Notably, the Court's holding in *Livestock Marketing Ass'n* was not unanimous; Justice Souter filed a thoughtful dissent to which Justices Stevens and Kennedy joined.[170] Justice Souter felt that in order for the government to garner the protection of the government speech doctrine, it must make itself politically accountable by clearly "indicating that the content actually is a government message."[171] Because many of the beef industry advertisements include the tag line "funded by America's Beef Producers," Justice Souter worried that the average layperson reading the advertisements would not readily associate them with the federal government.[172]

Given the Supreme Court decision in *Livestock Marketing Ass'n*, *Cochran* will advance freedom of speech much less than desired.[173] By holding the Beef Act constitutional, the Court effectively closed the door on facial challenges to similar check-off programs.[174] Still, *Cochran* did have an identifiable impact—it helped to pressure the High Court into delivering some needed lucidity to the area of agricultural check-off programs.[175] For many, this lucidity is not worth the associated free speech

169. *See U.S. Supreme Court Vacates 'Got Milk?' Decision; Remands to 3rd U.S. Circuit for Further Proceedings* (May 31, 2005), *at* http://www.ij.org/first_amendment/got_milk/5_31_05pr.html (noting that Dairy Act is usually attributed to "America's Dairy Farmers").

170. *See Livestock Mktg. Ass'n*, 125 S. Ct. at 2068-72 (Souter, J., dissenting) (rejecting majority's holding that Beef Act is government speech).

171. *Id.* at 2069 (Souter, J., dissenting).

172. *See id.* at 2072 (Souter, J., dissenting) (explicating by way of analogy that average person would not think beef ads were spoken on behalf of government). Justice Souter, in a colorful passage, expressed his concerns that the government is not being held accountable and thus should not be cloaked with government speech protection. He stated the following:

> But the tag line just underscores the point that would be true without it, that readers would most naturally think that ads urging people to have beef for dinner were placed and paid for by the beef producers who stand to profit when beef is on the table. No one hearing a commercial for Pepsi or Levi's thinks Uncle Sam is the man talking behind the curtain. Why would a person reading a beef ad think Uncle Sam was trying to make him eat more steak? Given the circumstances, it is hard to see why anyone would suspect the Government was behind the message unless the message came out and said so.

Id. at 2072 (Souter, J., dissenting).

173. *See* Inst. For Justice, *IJ Speaks Out Against Government-Compelled Speech in Beef Case* (May 23, 2005), *at* http://www.ij.org/first_amendment/got_milk/5_23_05pr.html (declaring that free speech "suffered a setback" as result of Supreme Court's Beef Act ruling).

174. *See* Michael Doyle, *Farmers Must Pay for Ads: High Court Upholds Beef Industry's Mandatory Fees* (May 24, 2005), *available at* http://www.sacbee.com/content/politics/v-print/story/12945658p-13793344c.html (stating that *Livestock Marketing Ass'n* decision will stop further challenges to these type of programs in future).

175. *See* Thomas Goldstein, *The Upcoming 2004-2005 Term*, 2004 CATO SUP. CT. REV. 493, 495 (2004) (noting that Court had "opportunity to bring further clarity" to this confused area of law by hearing check-off program appeal).

setback because they had hoped that the Third Circuit's decision in *Cochran*, coupled with the concordant sister circuit decisions, would persuade the Court to move further away from its restrictive decision in *Glickman*—a precedent that some speculated the Supreme Court itself had begun to discredit.[176] Unfortunately, the decision in *Livestock Marketing Ass'n* dashed those hopes. It now seems that practical economic considerations will rule the day over the free speech rights that many circuit courts, including the Third Circuit, defended adamantly.[177] By labeling such check-off programs as government speech, the Supreme Court appeared to contradict the original understanding behind the use of such programs.[178] Accordingly, it is evident that some of the most popular advertising campaigns in history will remain intact rather than relegated to the ashes of advertising history.[179]

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176. *See* Michael Doyle, *Growing Controversy: Courts Look at Promotional Fees That Many Farmers Must Pay*, FRESNO BEE, June 8, 2004, at C1 ("[S]ome attorneys . . . believe the Court's majority has begun abandoning its [*Glickman*] reasoning and adopted a more skeptical view of all promotion programs."). The article then quoted Justice Carlos Moreno, of the California Supreme Court, as saying: "'The United States Supreme Court appears to have distanced itself from [*Glickman*].'" *Id.* The *Glickman* decision has received much scholarly criticism over the years. *See, e.g.*, Fox, *supra* note 6, at 433 (advancing scholarly criticism of *Glickman*); Schoen et al., *supra* note 39, at 497-503 (describing "First Amendment shortcomings" of *Glickman*). Actually, the Court was able to resolve the issue without having to further disturb the already murky waters of both *Glickman* and *United Foods*. *See* Mauro, *supra* note 162 (quoting California agricultural group representative as saying Supreme Court's analysis was "clean way to resolve" currently chaotic area of litigation).

177. *See* Tony Mauro, *supra* note 162 (noting practical concerns grounding government speech doctrine rationale and how Supreme Court extended that rationale to check-off context). In all, if the Court decided the other way the potential total demise of the check-off system could have cost up to $700 million removed from the annual marketing economy. *See* Edwards, *supra* note 24 (quantifying potential costs if all check-off programs were voided). As an example of the negative monetary impact that striking a check-off statute may have, Edwards detailed the decimated state of the Mushroom Council marketing budget after the *United Foods* decision. *See id.* (exhibiting current barren state of Mushroom Council's ad budget).

178. *See* Flory, *supra* note 165 ("[C]heckoff programs were supposed to be producer-run and producer-controlled and . . . producers will be shocked to learn that the checkoff is simply another government program."). For a further discussion on how producers may not agree with the Supreme Court's government speech characterization, see *supra* note 165. *See also supra* note 131 (describing how Dairy Promotion Program website itself labeled check-off program as non-governmental program).

179. *See* First Amendment Ctr. Online, *supra* note 163 ("By regarding these marketing programs for the first time as government speech, the Court may have effectively taken them off the First Amendment playing field. Pending cases involving promotion programs for pork, milk, cotton and other products, will likely be resolved under this new framework.").